

August 9, 2018
Washington State Gambling Commission Meeting Transcript for
Big Fish Games, Inc. Petition for Declaratory Order

0:43:20 Sizemore: Without objection it's in, so, if we can get that somewhere in the future. That brings us to tab 4, which Brian gets to stick around. We have Big Fish Games Incorporated Petition for Declaratory Order, and this is continued from our July meeting, and I know that we made request for additional information at that July meeting and we had a lot, and some of it was just in the last few days. So I'll let you, Brian, kind of run this, steer us through this process, and we'll work through it.

0:44:17 Considine: Thank you, Mr. Chair. And for the record, again, Brian Considine, Legal and Legislative Manager. I figure I'll give a brief overview of what I see is maybe the best way to do this, especially to create a helpful record moving forward. But you're right, we had our July meeting, and at the July meeting, Mr. Chair, you came out and you asked three things, but really two very specific things, was for information related to a thing of value and what it means under Washington State Law based on the parties reading of it and, two, what constitutes a necessary party in our law and the rule. And then I quote the rule in the memo and I'm not gonna go through all of that, unless you want me to, and then any other factors you believe the Commission should receive. And so then based off of that, I think it's quickly just read into the record, but what I figure, we'll go through the documents that we have, see if there's any questions related to that, then we'll take the, what I'm calling, the procedural issue first, the necessary party, because of the way that the law is written, if somebody is a necessary party, you are prevented from moving forward with a declaratory order.

0:45:30 Considine: And so I'll quickly brief that, we'll have any parties... Ms. Brinkman could not make it today, but another attorney in her firm, Emily Hahn, is here and she'll be presenting on behalf of the petitioner. Mr. Tievsky is still here for Ms. Kater and then, only specifically talk about necessary party. Anybody else after those two individuals wanna talk, clearly you have public comment. Kinda close the comment on necessary party, and then move to thing of value, that's the more substantive meat of the issue. Have the same sort of thing. The petitioner will go first, Mr. Tievsky, anybody else, and then see if there's any other topics that you want some extra comment on. And of course, you all know how to ask questions and all that, and the parties are ready to answer your questions as best as possible. So, that's kind of my plan for today.

0:46:24 Considine: And then after you feel you've received everything that you need, you've asked all the

questions, you will be able to go into closed session just like last time with our AEG, Mr. Kernit, and be able to have your conversation, and come out and announce how you would like to move forward, or if you wanna make a decision. And I'm happy to save the procedural posture at the end, but just upfront, the same options that were before you last month are the same options before you this month, and I'm happy to run through them before you break for your closed session.

0:46:58 Sizemore: Brian, before you move on to the next, I'd just informally, I guess, I would like to ask those that will be coming forward on this topic, do you anticipate needing more than 10 minutes?

0:47:16 Emily Henn: No, I think that would be adequate time to address the issues...

0:47:22 Sizemore: Okay, okay. Mr. Tievsky?

0:47:25 Alexander Tievsky: It depends on how many questions. But for my initial recommendation no, certainly not.

0:47:27 Sizemore: Okay.

0:47:27 Considine: Thank you. So I can put on the record, both representatives said that 10 minutes should be sufficient, but it depends on questions and how it goes.

0:47:38 Sizemore: Sure.

0:47:40 Considine: So, quickly running through what's in your packet, because there was a lot of things that came in. Tab A, I believe, should be the transcript. Felt it was probably helpful to have the transcript from just... It's not the full meeting, it's just the portion that dealt with the petition. Tab B is all of the documents that you had before you at the July meeting. So that would be the petition from Big Fish and the letters from DoubleDown Incorporated and, I think, Huge Incorporated in favor of the petition, and then Miss Kater's comments as well. Tab C should be a citizen. She has identified that she lives in Texas. She submitted a consumer protection complaint with the Attorney General's Office. And then after that was completed, I believe the AG's office let her know that we had this petition going on. So she wanted to submit all of the documents under Tab C as her comment, but she's not expected to appear today or I don't think at all. D. Tab D should be the petitioner's response to your questions related to necessary party and thing of value. Tab E should be Miss Kater's response on... Mr. Tievsky's response on behalf of Miss Kater, that also deals with thing of value and necessary party.

0:49:25 Considine: Tab F should be a statement from a woman named Suzie Kelly relating to her customer experience with, I believe, Big Fish Casino. Tab G should be a letter submitted by the Entertainment Software Association. And as a frame of reference, I know Commissioner Stearns is very familiar with ESA 'cause they are the trade association for Nintendo, and Microsoft, and other software video game companies who we have had lots of conversations with, good conversations. They've been very, very good at being available on the skins and loot box issues that we dealt with last year. So they submitted a letter, I believe, in support of Big Fish's petition. And then two more documents that came in that I put at your place this morning. The first one is a letter from an individual who wished to remain anonymous on the record because of fear of just being outed on the record for, I think, her work, or her family, or something like that, the embarrassment. And so anyways, this was submitted through Mr. Tievsky. And so he might be able to answer any questions

related to the letter, but it's the one-page double-sided that starts with, "Dear Commissioners".

0:51:03 Patterson: I was just puzzled about the letter because it was anonymously provided, but in the letter I read that this individual said that they look forward to telling us more about their experience next week. How would that happen?

0:51:17 Considine: Yes. So Mr. Tievsky... This was submitted through Mr. Tievsky, so he probably has a better ability to tell you about this individual. I know she wanted to appear by... Actually appear in person today. I believe she's a Washington resident, and something came up so she couldn't make her way to Pasco. The second letter that you received has an NYU watermark at the top, multi-page from Dr. Schull. Dr. Schull is the person that Mr. Tievsky had mentioned that wrote the book that you had inquired to get a reference from. So she submitted comments as well. And as of... I haven't checked this morning, but as of yesterday, those are all the comments that I believe we received so far, based off of either your questions or knowing that there was still a comment period on the petition.

[pause]

0:52:24 Considine: So moving forward. Unless there's any questions about the documents, I think we'll get into the necessary party topic. Yes.

0:52:38 Stearns: So just quickly, when you're talking about the RCW 34.05.240 where it says that the agency may not enter a declaratory that's under... I don't know, I believe that's Section seven, where the agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party.

0:53:06 Considine: Correct.

0:53:06 Stearns: So just as you go along, just keep in mind that I'd also like to know more about the first part that says, "Prejudice the Rights." So if you could just also explain to us what that means?

0:53:16 Considine: Right. And I think that it's a little bit unique position for me 'cause I love to try and explain things based off of my... Because staff's not really kind of a party to this. I think that is a question, and I think the attorneys probably heard that as well, that that first part is something that they should be focused on when they're telling you what they think it should be.

0:53:42 Patterson: For non-attorneys, could you talk about what you're talking about in a little bit different way?

0:53:49 Considine: Sure. This is the same issue as to whether or not the commission... Whether or not somebody is a necessary party to the action and consents to you making the decision. So what you've heard previously is that Ms. Kater believes she's a necessary party because she is a plaintiff in lawsuits against a Big Fish petitioner, and that this will negatively impact her case if you issue a declaratory order as the Petitioner has requested, which is to say what they do is not gambling, which would, in some ways though, that was Federal Court. This is... We're clearly a state agency related to kinda state court issues, but if you say it's not gambling, would be argued. Mr. Tievsky can talk more about it, but what he had said at the July meeting was it would undercut what the Ninth Circuit said.

0:54:42 Considine: And so they still have a case. This could potentially make their case go away, because the intent would be for any party that this commission is set to interpret state law would say, "The Gambling Commission says this is not gambling, so you can disregard what the Ninth Circuit said, because we'll get into the facts and this is what you can apply." And that's a really generic summary.

0:55:08 Patterson: That's good. I got it. Thank you.

0:55:09 Stearns: And that's what I was getting at, those three things there.

0:55:09 Considine: Right.

0:55:09 Stearns: Those stands for rights, necessary party consent rights.

0:55:09 Considine: Right. Yeah. And that was some of the conversations that I know Ms. Brinkman and Mr. Tievsky had with you before is, are they substantially prejudiced and what does that mean? And my expectation is that both Ms. Fenn for Big Fish and Mr. Kievsky should be able to go into that a little bit.

0:55:36 Commissioner Troyer: They're a lot of lawyers who work there. I only know enough to be dangerous, but as we're taking a look at this, instead of trying to regulate it to just this particular case, this particular incident, these people, I think we have a way bigger overall picture to take a look at. And there's a lot more to this than who wins or loses between these two people in court. I think the decision that we make and what we look at here could have long lasting effects on everybody for a long time to come, and I understand that you are kind of looking at this as a legal issue or legal motion, but I think that we have ability to do some type of investigation.

0:56:20 Troyer: There's people on our staff that know more than we know and understand it and take a bigger overall look at this whole entire problem and not make a decision based on hierarchies, because this is gonna effect a lot of people, a lot of money. It's a lot to contemplate. Well, I just don't want to keep it narrowed down to just this. I wanna take a bigger role on the overall picture. The problem with gambling, the issues on the backend of all of this and what does the legislators think of this, the Governor's office, what do they think of this? Is this extension gambling or not extension gambling? And millions of dollars in numbers that I've been reading about. But yeah, we're taking around with paper pull-tabs and everything else. And if anybody brings up the word video monitor for a pull tab game and lobbyists and everybody goes crazy. But just hanging this over without really thinking through and looking at it in an overall view despite this case I think [0:57:24]__.

0:57:25 Considine: And Commissioner Troyer, you're correct that Big Fish is brought before you just a petition related to their game. And we know just based off of litigation that there's four or five at least, and probably more companies that would at least tangentially be affected by that. So I think that that is something that is incredibly... It's something that you talk with AEG Kernit when you're in close session, but I think it's something that is appropriate to have that discussion as to whether or not you want to do this kind of a company by company basis or whether or not you want to take a larger kind of view of this, and you can use that as how you determine how you want to move forward.

0:58:07 Patterson: How we want to move forward versus how we would recommend the legislature move forward?

0:58:12 Considine: I would say how you want to move forward. It can be how you think we should advise a legislature to move forward. That's part of it. And I guess going back to the procedural, which I should probably have started with, you can say you can agree with the petition. It's not kind of like the rules petition where you say, "Yes, we'll agree to do what you... To engage in that specific rule-making." This is left to you to say, they want you to say, "It's not gambling." You could go the other way. And we talked about that in July. You could determine that it is gambling. You can also have that third option that says, "We, for these good reasons, don't feel that we're going to issue... We don't feel it's a good idea to issue a declaratory order." And then part of that is just because you don't issue a declaratory order doesn't mean that you as Commissioners can direct me or others to have these conversations with legislators, to reach out to ex-officio and our committees, much like we did with Skins and Loot Boxes last year and other topics that have come before us where we think there needs to be some education with the legislature and some exploration on the issue.

0:59:12 Patterson: Mr. Chair?

0:59:13 Sizemore: Yes.

0:59:14 Patterson: I think this is a great example of how our commission could provide a great service to the legislature. This is an area where we could give advice on this topic. So I know that this is one of our goals and our strategic plans to improve our relationship with the state legislature and to interact more meaningfully with them. So I just wanted to say that this potentially could be one of those topics.

0:59:47 Sizemore: No, I was just gonna say that... I mean, we are being asked to make a declaratory order. I think certainly the discussions that we have and ultimately the decision that is made will spare a lot of next steps, whether it is with the legislature or some other avenues. So, at this point, we are being asked to act and we have the option to act the way they want us to, act the opposite way they want us to or not act at all, for a good cause. So those are our options.

1:00:42 Patterson: I guess what I'm thinking is if... Let's all wait to see what we're gonna do.

1:00:48 Considine: What my recommendation is... Sorry, go ahead, Senator.

1:00:52 Conway: Can I just have a question here as we bring in the legislature here. What would be helpful is to understand what other states have been doing around these issues as well. And I'm hoping that maybe you can provide that to me.

1:01:07 Considine: Yeah, I'm happy to find the time to do that offline. What I was gonna say is my recommendation is, I think this is valuable discussion for you to have, but I think it is good to start off the way that we said, 'cause those are the topics that you asked for and this is a much broader conversation that I think we can have at the end. I think it's good to have that good open public dialogue on what you're kind of struggling with, what you're trying to figure out, how the best way to do that. It also allows the public to add additional comment onto that. But because from really technical legal part is if you all get enough information and with discussions amongst yourselves, and you decide that you don't feel that you can legally move forward, because at least you know,

and I get the substantial prejudice part, Commissioner Stearns, but we know they haven't consented Mr. Tievsky wanted to make, and he'll say it I'm sure, again, that they want to engage, they want to be as helpful as possible. But by no way are they waiving that argument, which is why we're having more conversation about it today. But that's the procedural hurdle. So, if you all feel that they are a necessary party who has substantial right, then you can't move forward in getting into all the other stuff. While maybe is important yet isn't necessarily part of the petition, it's something you can take up on a different path.

1:02:31 Sizemore: Okay. Get us back on track.

1:02:34 Considine: Thank you. And Senator Conway, I did hear you and I'm happy to try and provide that information, certainly. So, I think we've teed it up pretty well. I don't know if you need to hear from me anymore on unnecessary party, because Commissioner Stearns did a good job of breaking down the three parts. I'll ask Miss Henn come up. I'll stay here in case there's any questions of me, but I'll let Miss Henn come up and give her part on... I'm guessing what they're gonna say that they're not a necessary part just like they did last time.

1:03:05 Sizemore: Okay. Welcome.

1:03:09 Henn Thank you very much.

1:03:14 Sizemore: And if you could identify yourself for the record when you're ready.

1:03:17 Henn: My name is Emily Henn. I'm here on behalf of the petitioner, Big Fish Games. Thank you Mr. Considine and thank you all for allowing us to be here today and address you about our petition for declaratory order. We're happy to take these issues in the order that Mr. Considine has described and, as he explained last month, my partner Ms. Brinkmann touched on these issues, but our understanding was that the Commission had asked some questions. We did submit a letter on the necessary party issue, which I'd be happy to address today and answer any questions you may have. This Commission has regulations and as Commissioner Stearn's indicated the revised code of Washington also has a provision under the Administrative Procedure Act that provides that an agency may not enter a declaratory order that would substantially prejudice the rights of a person who would be unnecessary party and who does not consent in writing. Whatever our position is that whatever interest Ms. Kater may have in the legal arguments that are at issue here about the definition of gambling, she does not qualify as a necessary party within the meaning of the regulations or the code.

1:04:47 Henn: And that's because, if the ruling that she is urging and the interpretation of necessary party that she is urging would mean that anybody with an interest in the meaning of state law could prevent this commission from carrying out its responsibility that the legislature has given it to interpret and enforce the Washington Gambling Act. She, of course, has an interest in her claims that she is pursuing in federal court and those claims will be resolved by that court or an arbitrator. But the meaning of state law, she doesn't take the position that that's a matter that the federal court should decide. Because that's not how our Federal system works. It's for the legislature of this state and this commission to interpret the laws that are currently in effect. And of course, state courts can review those determinations and will to make a final determination of what state law means. That's not the job of the Federal court, which can, of course, make a judgement about what state law means. But really that job is for the state legislature and which has delegated authority to this

Commission.

1:06:06 Henn: The necessary party provision, what that does is protect a third-party from having an agency directly adjudicate its rights. And that's why that the language in the provision is very important, it refers to rights. And what the necessary party provision prevents is a declaratory order preceding, for example, in a matter where a contract is being interpreted, and we cited a case where there is a collective bargaining agreement, one party asked an agency to interpret it, and the holding was that the other party, the employer, to that contract was a necessary party. That's because any determination about that contract, that collective bargaining agreement, would affect the rights of that other party.

1:06:55 Henn: But here, we're not asking the Commission to enter an order denying relief to Ms. Kater on her claims. Again, those claims will be resolved by the federal court, or the arbitrator. And the necessary party provision doesn't prevent agency action from occurring merely because a third-party is interested in the meaning of state law. That's such a broad standard, that it would really mean that any time someone had an interest in the meaning of the state law that this Commission interprets and enforces, they could stop the Commission from entering a declaratory order merely by filing suit in court, and that's not the rule. You can't sort of artificially create this situation and assert that your rights are at issue when really what your interest in the matter is merely an interpretation of what law means.

1:07:53 Henn: And of course, Ms. Kater and her... Ms. Kater is a Michigan resident represented by a Chicago lawyer who, in that lawsuit, is seeking to represent a nationwide class. So under the ruling or the necessary party interpretation that Ms. Kater is urging, any of those people could potentially come here and say, "No. I understand this is the state commission, that's charged by the legislature with interpreting and enforcing law. But I don't consent to you doing that." And that's just too broad of a reading of that statute.

1:08:30 Henn: The submission by Ms. Kater talks a lot about the necessary party standard that applies in civil cases, and that's just a very different standard. That's a determination that courts make about whether a party can come into a case, and it's a much lower standard. It also just has different words and that's why I'm pleased that the Commission is focusing on the words in the regulation and in the code that apply here, that rights of an individual, a third-party, must be substantially prejudiced. We don't think Ms. Kater has rights at issue here, more than simply an interest in how this commission interprets state law, and we don't believe that Ms. Kater's interest would be substantially prejudiced regardless of how the declaratory order petition is resolved. She has her case and the proper place to resolve that case is in Federal court, or with an arbitrator, and that's yet to be decided.

1:09:35 Henn: We also have argued in our letter, and the arguments are there, so I won't spend a lot of time on them here, that we don't think Ms. Kater, would even qualify as a necessary party under the Civil Court standard, because really what she's asserting is an interest in a monetary recovery and courts, as we've mentioned in the letter, have held that that's not enough. But we don't think that's the key issue. The key issue here is to apply the regulation and the code provision that only someone with rights that would be substantially affected by the Declaratory order is a necessary party under that provision that must consent to this Commission acting on the petition. So I'd be happy to answer any questions or yield to others.

1:10:30 Stearns: So maybe you could just flip it around, just for my sake. So could you explain what... Further two things, what would make her a necessary party and what would be a right?

1:10:46 Henn: Absolutely. I think the best way to explain what would be a right and what would make her a necessary party is to look at other cases decided by agencies or state courts interpreting that very language. And I gave one example which is, if your specific right is being adjudicated through the declaratory order, for example, that employer's rights in the collective bargaining agreement. The agency there decided we can't decide this issue, because it would determine rights of an employer who's not here, and who doesn't consent. So, that's one example.

1:11:28 Henn: Another example is the Department of Ecology case. I think it was the Boeing company versus the Department of Ecology. There, the agency held that another agency which had promulgated a rule, was a necessary party when Boeing came to a separate agency and said, "Please rule that that other agency's rule doesn't apply to us or should be interpreted in a particular way."

1:11:54 Henn: So there the other agency, since its regulation and the interpretation of its regulation was at issue. That agency was determined to be a necessary party without which the order couldn't proceed. So it has to be a specific right, and the petition... Here, our petition seeks a ruling as to... That Big Fish Casino games are not gambling. That determination would have to determine a right of Ms. Kater. And while she clearly has an interest in how you interpret state law, because she has a separate case about that. Our position is that that's just not enough, and if it were enough, that it would just be way too broad a standard that would really mean that the agency charged with interpreting and enforcing the Washington Gambling Act, couldn't ever act. It would be very easy for a party to say, "Well, I have a lawsuit over here, so you can't act." That's our position...

1:12:55 Stearns: So, like a contractual right or a property, right? Is that what you're going?

1:12:58 Henn: Correct.

1:13:00 Stearns: Okay.

1:13:01 Henn: Exactly.

1:13:03 Sizemore: Okay. Is there any questions? Alright. Thank you.

1:13:10 Henn: Thank you very much.

[background conversation]

[pause]

1:13:26 Sizemore: Good morning.

1:13:27 Tievsky: Good morning, I'm Alexander Tievsky, I represent Cheryl Kater in the lawsuit against Churchill Downs, involving Big Fish Games. I thank the Commission for having me back. It's great to be here. So what I'd like to do is go through very briefly, talk about sort of our affirmative case on necessary party and then I can address some of the arguments you heard. As you've heard a couple of times, if in a declaratory order proceeding, if the Commission's going to adjudicate... If

the Commission's order's going to substantially prejudice a necessary party, they require written consent. I know that I am here, but Miss Kater has not provided the written consent. So, that element is established and the question is about the other two. So as far as necessary party is concerned. The term "necessary party" is well-established in law. And there's no cases, no authority to suggest that it means anything different in the context that it's used in your rules and the statute that regulates this Commission than in any other case. The Washington Supreme Court's answered this question numerous times. It's a pretty low standard. It's a question of, "Could someone's rights, legal rights, be affected?"

1:14:44 Tievsky: They're right. If you have a thought about how the law works, and you come and you say, "I have a thought about this and I disagree and I don't consent." That's not enough. You've gotta have something more than that. And in this case Miss Kater has a lawsuit. She's got a cause of action that she is given by a Washington statute. I haven't heard any explanation about how that's any different from a legal right you get from a contract. In this case her right doesn't come up from contract, it comes from a law of this state that says that she's got a certain right to recover money that she'd lost at illegal gambling. If you enter the order that they asked for, that makes it more difficult for her to exercise that right. And that's all you need here. The Washington Supreme Court's made pretty clear that it is the claim that it will affect you, that is required. It's not... The Commission doesn't have to decide for sure that it's going to affect them or that the law means a certain thing in order to determine that someone is a necessary party. As far as the second part, substantial prejudice, I think that's clearly met here.

1:15:50 Tievsky: The reason they're here and asking you for this is because they would like to go back to the court and say, "Look, look, the Gambling Commission said this wasn't gambling and therefore you should listen to them. The Ninth Circuit got it wrong. They misunderstood the law. We know now the law is clear." The Gambling Commission has said, "We're fine." And so Ms. Kater needs to lose. I guarantee you that's what they do, because they've already tried with the pamphlet that your staff put together years ago. They told the court, "The Gambling Commission has already decided this. You have to listen to them." If it is done in a formal way as Miss Brinkman talked about last time, that will be a much stronger position for them, and that will... It is not a sure thing, but it will likely cause Miss Kater to lose. And that would be substantial prejudice. She's spent years litigating this case. She'd lost in the District Court, she had to appeal it. It takes a long time, it takes a lot of resources. And courts have recognized that when a defendant litigates something in one court, in one forum, doesn't like the answer they get and go somewhere else, that's prejudicial. That hurts the person who won, 'cause it negates their victory.

1:17:04 Tievsky: I'd like to address a comment that was made a couple of times in the previous testimony, that somehow Ms. Kater or somebody else could come in here and prevent the Commission from acting on this matter, that is not true. It is simply a procedural question. It is, "Can you do it this way?" And so, the declaratory order proceeding you're deciding, based on what Big Fish has submitted, right? Their petition. Not based on the investigation of your staff, there is not public notice and comment. The Commission has procedures, formal rulemaking under the Administrative Procedures Act, an interpretive statement, lots of ways you can interpret the law that Miss Kater had no say in whether or not you do it. But the Declaratory Order is a special type of proceeding and it's a little bit streamlined, it doesn't have the same procedural protections, you don't have to publish your proposed rules, all of those, all of those protections aren't there. And I... Look, no court has interpreted it and says this, but it appears to me as though that's why this consent requirement is here, to make sure that if you're gonna do this, it's done in a fair and open way, like

Commissioner Troyer was suggesting earlier. So, we, Ms. Kater would not come here and if you were doing rulemaking or an interpretive statement and say, "No, you can't do this." It is the way that is being done that causes the problem. Any questions I can answer for the Commission?

1:18:31 Sizemore: Any questions there? So my question might be to Brian just to affirm what I just heard there. So what he's saying is that a Declaratory Order then the necessary party aspect does apply, but if we, as a commission had saw the Ninth Circuit decision and said, "Oh we wanna do a rule that clarifies that it is gambling or clarifies that it isn't gambling." If we initiated that, then neither Big Fish, or Ms. Kater or any other individual would be... Have this necessary party or that way of not consenting.

1:19:27 Considine: That is correct, without going through the entire Administrative Procedures Act to see if there's another, but the way that it's been positioned, yes. I've spent a lot of time in the APA and clearly AAG Kernit can correct me if he thinks I'm going to misspeak and I encourage him to do so, if I do. But, yes, necessary party is very unique to this specific action. It's not in rulemaking. They can come and give comment, and you've gone through a lot of rulemaking but they couldn't come and say, "This is going to really harm us and you can't do the rule-making or you can't do an interpretive statement or you can't do some other action that you are able to do."

1:20:11 AAG Kernit: You accurately summarized the issue. So I have no corrections.

1:20:19 Sen. Conway: This may be in terms of, I don't think we've covered what's happened in other states and one of the letters referenced on the actions of Maryland, California, Delaware, Michigan [1:20:36].

1:20:40 Tievsky: Yeah. I litigated the Maryland case, and one of the Illinois cases, so I can speak to that a little bit. Those states have very different laws than Washington does.

1:20:50 ?: [1:20:52] That happened to the same client?

1:20:53 Tievsky: No, they're different clients, different games, many of them that work in different ways, but most importantly, the statutes are really different. So Washington statute says that people can recover if they lose money or a thing of value. In Maryland, you have to lose money, period. There's not a thing of value there. And so the courts said, "Well you didn't lose money, you maybe lost this thing of value, but that doesn't matter." But in Washington, that's not the law. And the Ninth Circuit made the same comment. Those are very different laws. In Illinois there is a requirement that you can only sue the winner of a gambling game and the courts have said, "Well, these people aren't... Running these games aren't winners because they don't put anything at risk."

1:21:39 Tievsky: I don't know how true that is, but in Washington, the law allows you to recover from a winner or a proprietor. Those are... Proprietor is a much broader comment, so it doesn't really apply. So these gambling laws are real old and states develop them in different ways, and I would say that Washington regulates gambling more tightly than a lot of states do. You know, the work that you do here and the degree of oversight that this commission has is far more than you see, certainly, in places like Nevada, but even in places like Illinois or Maryland. And so that's why you see different results in different states. Hawaii is a really interesting example. Hawaii's law is almost exactly the same as Washington's, except that it lacks the thing of value definition, at the very end, lacks the phrase "play at a game without charge." And there's actually a lot of discussion in the Hawaii House

of Representatives about that issue and about potentially changing that. I hope that helps.

1:22:46 ?: Yeah. Thanks.

1:22:47 Considine: I just note, we have not, I have not, I don't believe staff has spent a lot of time yet, looking at those cases, just based on the posture of this, I would guess that these other cases are all civil cases between non-governmental entities. So it's manufacturers, proprietors and customers or citizens. So those cases are all going to be very different. The way in which they're set up, is gonna be different because, much like Mr. Tievsky just talked about, they're coming under... Well they're not consumer protection laws, they were laws that were put into place to try and provide a remedy for someone who felt that they were being taken advantage of by someone doing an illegal activity. Whereas this clearly is coming before the regulatory body of the Gambling Act and asking for you all to interpret something related to their games, and it can be taken in other places. The facts may be the same, but the procedural posture, how it gets before you, how you look at it, and what happens from here is going to be a little bit different than those states. So while those cases very well could be informative, and I'm sure it would have be, whether its staff or asking the parties to kinda provide some summary of that or counsel. We can do that, but I don't... I'm sure it's helpful, but I don't know if it's going to provide a great answer.

1:24:19 Sizemore: Okay, perfect. So...

1:24:20 Considine: Sorry.

1:24:23 Tievsky: Oh, I didn't have one.

1:24:24 Sizemore: You're good?

1:24:24 Considine: I was just going to say, because we talked about these other states, I was going to recommend that we invite at least Ms. Henn on behalf of Big Fish, if she wants some comments specifically on what have other states done with this, since we've given Mr. Tievsky the ability to talk about that. Short, brief, just gives them both... You hear from both.

1:24:41 Sizemore: Sure. Yeah.

1:24:43 Considine: Okay.

1:24:43 Sizemore: Absolutely.

1:24:44 Considine: And then she can stay up for the next part.

1:24:46 Sizemore: Okay. And I'm gonna actually give us about a five-minute recess.

1:24:49 Considine: Fair enough. But for the record purposes, if we can kind of finish the state part, then we break.

1:24:53 Sizemore: Yeah. Yup.

1:24:54 Considine: Okay. Awesome.

1:24:56 Tievsky: Thank you.

1:25:03 Henn: I'll make this brief and I appreciate the opportunity to comment. I think these other state cases probably get into the next issue, we're gonna talk about thing of value, and how other states have interpreted gambling. I will recommend to you the ESA letter, which... ESA is uniquely positioned, having members as they do who operate all over the country. And they have followed these cases very closely, while these other states were interpreting different laws. And of course, that's critical when you're interpreting a statute, to pay attention to the language. I think it's worthwhile to note that many of those cases it was Mr. Tievsky's firm representing different clients, but really out suing, bringing cases that are an attempt to expand the definition of gambling under all these different state laws. And as you heard, he's very familiar with them, because he's been through that process.

1:26:02 Henn: And as far as I'm aware, all of the states rejected these attempts to expand gambling to encompass the types of games that we are here today to talk to you about, Big Fish Casino, where there's no possibility of getting money back. Once you buy a virtual item, your money is spent regardless of the outcome of any games that you play. But I think that discussion is probably better held for the thing of value discussion. But it is, I think, that ESA letter is very helpful to walk you through just exactly what those courts held and why they determined under those laws that these types of games are not gambling.

1:26:46 Sizemore: Alright. Any... Okay. Just to close this out, I did want to offer or ask if there are any other parties in the public or in the audience that wish to add something to the record regarding a necessary party. So is there anyone? Not seeing anyone. If we can, I'd like to do just like a five-minute recess and then we'll come back and take it up right where we are.

1:27:25 Henn: Thank you very much.

1:27:26 Sizemore: Okay. Thanks.

1:27:28 Sizemore: Start coming back.

[background conversation]

[pause]

1:28:47 Sizemore: Alright, I will call us back from recess and we will return to the petition for declaratory order as proposed by Big Fish Games. And Brian, I'll put you back in command.

1:29:04 Considine: Thank you, Mr. Chair. The next topic will be related to thing of value, which is really the substantive part of this. To try and help frame it clearly, our gambling laws, we're very good at summarizing it shortly as you have to have prize consideration in a game of chance. I think to simplify it as this, based off of what is in the record, and there's not a lot other than conversations with questions as to what are the games that are being played, I think everyone can agree they're casino style games. So I think [chuckle] they're at least games of chance under our... Under Washington State law. And so that thing of value, which has its own definition... So this gets into the legal weeds, but unfortunately that's a little unavoidable here, that thing of value a... Always

attaches to that consideration which is, what do you pay, what do you give for a gambling activity when we're talking about gambling, and then the prize, what do you receive, it all centers around thing of value, which is where the Ninth Circuit opined on and really, where really the crux of what you'll hear from Ms Henn, Mr. Tievsky and anybody else will relate it to... Is there a thing of value that they're either giving or that they're receiving as a prize? And under our definition, whether it meets that.

1:30:39 Considine: That's why thing of value, one, why I'm... I believe you came back and you wanted to know that, 'cause that's what it centers around and that's really what the Ninth... That's what the civil case centers around, that's what the petition centers around. And I will let Ms Henn summarize how they feel it fits or doesn't fit within their operational model. But just wanted to talk about... To set that up real quick.

1:31:05 Sizemore: Got any questions for Brian before Ms Henn...

1:31:07 Conway: I have a question.

1:31:07 Sizemore: Yes.

1:31:08 Conway: Is thing of... There we are. Get away from it. Is thing of value defined in law or defined through court decisions?

1:31:18 Considine: Thing of value is defined in our gambling act.

1:31:19 Conway: Okay. Is there a court interpretation of that thing of value, what's... Is this part of the discussion here? Sometimes, I know law... You have a law in the books, and then you have administrative decisions that are made around that law. And I guess, to me, I'd like to know a little bit more of that history, because it's not the first time this commission's had the thing of value before. [chuckle] And so I guess that would be a request for information on it.

1:31:54 Considine: Certainly, and I think this may be helpful, is, the Ninth Circuit issued a decision interpreting our statute related to the civil claims that Miss Kater was bringing. You are determining it, based off of your regulatory authority, based off the information that you're receiving. And it may just be best if I read the statute into the record. That way, maybe that's a little helpful. "Thing of value, as used in this chapter, which is the gambling act, means any money or property, any token, object or article, exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge." And it was, I think, without remembering directly and looking at the citation, that while it says 1987, I think that's the original definition from 1974 or 1973. I think they reorganized the statute in '87. I don't believe it really has changed since it was first created. And written only the way the legislature could do in the '80s, in a long paragraph like that, I know it can be a little bit hard to follow, and that's why we have Miss Henn and Mr. Tievsky to let you know their thoughts on that.

1:33:25 Considine: But this is the definition... The definition I just read is what we're talking about, when it relates to, if what you're paying is a thing of value, and I think more on this end, based on conversations that I've heard several representatives from these companies talk about, it's that there's no prize. Their argument is, and she can talk about, there's no prize. And so, even if there is

consideration, there may or may not be, because you can play these games for free, but you can also spend money to upgrade the product. There's no prize. And that's been the argument that we've heard, and that's where thing of value comes in, and it has come in on other conversations that we've had over the last year, related to other types of activities, and whether or not a virtual object the way in which is being used. Is there a marketplace, those sorts of things. Is there a thing of value? And you've been struggling... We've been really discussing this and getting into it in great depth for the last year or so.

1:34:22 Patterson: There is no prize, but the definition also includes the words "or involving extension of entertainment?"

1:34:31 Considine: Correct.

1:34:31 Patterson: So, it's more than just... The definition includes more than a prize.

1:34:36 Considine: Correct. And it's more than just getting money back. We've talked...

1:34:40 Patterson: Right. The definition includes the extension of service, entertainment or the privilege of playing the game without charge.

1:34:46 Considine: And that's where the Ninth Circuit seized... Of what I remember, the Ninth Circuit seized on that a little bit, too, that there was an extension of play and therefore the games were gambling. And that's where the Ninth Circuit came. And I'm sure the attorneys will correct me, if I've misremembered the case.

1:35:06 Trujillo: Right, and what you just read is... I think what it also comes down to the last part is "without charge," and that seems to be key, if there's an actual charge.

1:35:15 Considine: Right. And I think that's a very good question and a good segue to give it over to Ms Henn and let her kinda talk about that from Big Fish's perspective.

1:35:26 Henn: Thank you very much and thank you again. May it please the commission, I'd be happy to address thing of value, because I do think that's kind of where we're all focused. Just a note, I think you're all familiar, the petition that we filed is seeking a declaratory order on a narrow issue and it's essentially under existing law, which we'll get into on thing of value, whether Big Fish Casino games constitute gambling. Some of the procedures that Mr. Tievsky was talking about, making new rules or potentially the legislature making new law, that may happen. But what we're here today to talk about is existing law and whether this game is gambling. Our position is that Big Fish Casino games, virtual tokens, are not things of value because they can't be sold, they can't be redeemed, and they can't be cashed out for money or for a prize. And furthermore, they're prohibited by the game's terms of use from being transferred for commercial gain, excuse me, and have no real world value.

1:36:32 Patterson: Can I ask you a question?

1:36:33 Henn: Please.

1:36:33 Sizemore: Yes. Go ahead.

1:36:33 Patterson: So you just gave me your opinion of what a thing of value is. But we have the words in black and white right here, and what it is that the State of Washington defines as a thing of value.

1:36:45 Henn: Absolutely and...

1:36:47 Patterson: You're expressing your opinion that it is not a thing of value because of your definition of a thing of value. What about as it relates to the state of Washington's definition?

1:36:58 Henn: Yes. And that's... And our argument is very much tied to the statute so I'd be happy to jump right in there.

1:37:03 Patterson: I apologize if I jumped ahead.

1:37:04 Henn: Not at all. I wanna make sure I address the questions that are important to you. So under RCW 9.46.0237, that statute defines gambling as requiring the opportunity to win something of value. RCW 9.46.0285 defines thing of value and that's the statute you were looking at. And it could be broken down into four possible things that could be a thing of value. Money or property, a token or object or article exchangeable for money or property, a form of credit that contemplates transfer of money or property, and then the fourth one, which is where your question, Commissioner Patterson, is focused, and where the Ninth Circuit was focused, is "any form of credit or promise, directly or indirectly," I'm skipping a few words to get to the relevant part, "involving extension of a service, entertainment, or a privilege of playing at a game or scheme without charge." And we believe that under many established principles of how statutes are interpreted, that I don't think there's any dispute our game's tokens don't fall in those first three categories. The dispute is whether it falls under the fourth. And we think you have to read that fourth and the language "without charge" to recognize that if a game, as our game is, is free to play, that a token that would extend play that's already free does not qualify under that definition as a thing of value.

1:38:45 Henn: That's essentially the argument we make. We think it's very key that the statute when it talks about extension of a privilege of playing without charge. Big Fish Casino games are free to play. The vast majority, pardon me, of people who play never spend money at all. We've detailed in a declaration that was submitted with our petition. Free tokens are awarded to players every day when they sign on to the game, as well as every 30 minutes during game play, that's in the Vela declaration. And the problem with the logic of Ms Kater and her attorneys is that... And the ESA letter talks about this too, if in a free game, a token that extends game play is considered a thing of value, even playing with chips or tokens that the user acquired for free, would be gambling. And it's just inconceivable that the Gambling Act was intended to find gambling where a player risks no money, and has no chance to make a profit. And if this result were adopted again, the ESA letter points out, it would sweep a vast number of games into the definition of gambling that we would submit were never intended to be there. Essentially, what our declaratory order petition is seeking is a confirmation, a reaffirmation that what the commission guidance brochure from 2014 said is right.

1:40:28 Henn: And that's what everyone in this industry, everyone who works in this industry and plays these games has been relying on for many years now. And Mr. Considine referenced this. What that brochure describes is that there are basically three elements when you break them down to gambling, prize, consideration and chance. And whereas a game that's free to play, but that offers these in-game tokens that may involve consideration and may involve chance, it does not offer any

prize. And so it falls outside the definition. And that was very clearly stated in the brochure back in 2014. And regardless of whether that was a formal act by the Commission of passing, of publishing that brochure and providing that guidance, that has been the rule that everyone has understood and has relied on for all these years. So that's really kind of the narrow focus of our petition. Of course, Ms Kater is seeking... Her claim in the federal lawsuit is under a different statute, the recovery of money lost at gambling act. And so, she's portraying that as a right that's at issue here. Really what's at issue here is just whether that guidance is accurate, that everyone's relied on, whether that prize element is required, and whether extending a game that's already free to play could constitute a thing of value under the statute. Please.

1:42:13 Patterson: It's free to play, free... Monetarily free, but it's not... But when you extend it without charge, you are providing entertainment.

1:42:28 Henn: Absolutely, we think that... Again the game is free to play. Most people never spend any money in the game. A vast, vast majority. And we do believe our games provide entertainment value, that that's the value people get out of them. When people choose to purchase in-game tokens, that's what they're getting in exchange. If they buy tokens, that money is spent. There's no expectation or... That that money ever would possibly come back to that person. So then when they take those tokens and play games with them, they're not playing with a thing of value because there's no possibility that any money could come back in the form of a prize or otherwise. Those tokens have no real world value.

1:43:16 Trujillo: Okay. Can you... I think this will be helpful, Julia. Can you explain why the legislature would write "without charge," what that means?

1:43:27 Henn: Yes, we think the statute is very purposefully written in that way with those four different categories, each of which references money or property. And in that fourth category that, "without charge," brings it back to that same idea that, in order to be gambling, you have to not only have consideration and chance, but you have to have a prize, something of value, something of real world value. And so when you read the statute and you read all those elements or categories of thing of value, in conjunction, you read them together, you should read them consistently with each other. And the language, "without charge," is critical, because it's a different thing if you're extending game play without charge when you normally would charge someone \$10, that's value you're getting. But when you're extending game play that's always free, that's something differently entirely, and again the prize element is missing. And that's been the understanding of the industry again, and hundreds of thousands, maybe a million people who play these games in the state.

[pause]

1:44:41 Henn: We also, in our petition and in our letter that we submitted after last month's hearing, we've talked about some other statutory... Some other Washington law about how to interpret statutes. We've talked about the idea that if there are things are in a group, they should be interpreted consistently. There's also a principle that if there's a general term, it should be interpreted consistently with specific... Specifically identified items. And again here you've got money or property reference repeatedly and the idea of things having a real world value. And we also think it's very important, and this is recognized under Washington law, that you interpret a statute consistent with its purpose, and the Washington Gambling Act's express purpose was to keep the criminal element out of gambling, without restricting participation by individuals in activities

and social pastimes, which are more for amusement rather than profit. And these games, like many others, are unmistakably social pastimes that are played for entertainment, they can never be played for profit or real world value. So that idea of a criminal element, it's just not something that's even an issue with these games.

1:46:04 Henn: Another principle of interpreting Washington law is that it must be interpreted in accordance with The Rule of Lenity. And that's because the Gambling Act, as you all well know, imposes criminal penalties in certain circumstances. And the Rule of Lenity requires that if there are any ambiguities in construing a statute, they should be construed in a manner that limits rather than expands criminal liability. And this again gets back to sort of the limited purpose of this petition, which is just to ask this commission to settle this uncertainty and clarify that existing law, as written and as explained in the brochure and in place for many years, does not include this type of virtual token that can never be redeemed for anything of real world value. Does not include it as a thing of value that would fall within the gambling statute.

1:47:02 Sizemore: We've gone a little bit long and really haven't really paid...

1:47:09 Henn: I apologize.

1:47:09 Sizemore: Much attention to the clock. But I think I'll kinda let you know you probably have about three minutes left after... Not including Commissioner Troyer's question. So you can either use that now or after Mr. Tievsky. So that'll be your option. Thank you.

1:47:29 Henn: Alright, thank you very much. Please.

1:47:34 Troyer: Is it called for amusement, and you said there's very few people that actually buy the chips? Compared to how many people play?

1:47:43 Henn: That's correct.

1:47:43 Troyer: The ones that are buying the chips. Why would somebody buy chips? I get chips for 15 to 20 bucks a month or whatever. Why are we reading letters and stories and that stuff about a lot of people being thousands and thousands of dollars in debt, playing free, free... I mean it's probably not very amusing for them, at the end of the month somebody's got a problem, and ends up paying thousands of dollars. Why don't you have caps on them? Why is it their 29.95 monthly subscription never run out? It doesn't... But basically, it kind of sounds to me that you've created a way to gamble without ever winning for sure. So you know going in that you're not gonna win, no matter how much money you pump into it. But who does that? Obviously, people that have issues. And it seems kind of predatory to me. Without... Being a weird analogy, 'cause I've worked in law enforcement, what happens when a crack dealer gives somebody free pieces of crack? "Here's your first weeks for free." Then they come back and buy it? Really I mean, then they come back and buy it. "Well, if you want more. It's gonna cost you." Because you're looking at a small percentage of the people that are buying the money. Who in their right mind would pay chips for free unless they've got an issue?

1:48:54 Troyer: That's why I'm having a hard time explaining, anybody who actually sits down and plays this for fun, for hundreds and hundreds of dollars a month and they're actually having fun and aren't distressed about money, aren't hooked on gambling or something's wrong. Because anybody

with any common sense, you know? My 5-year-old granddaughter won't go stick a quarter in a machine unless it gives out a ticket and she gets stuffed animals. She says, "I can put the money in there and watch the thingy go around." But I mean, it's just this, I just have... That's really where I'm locked up at. People on the back end of this thing.

1:49:25 Henn: Yeah, well I very much appreciate that question and the comments, 'cause as I said, I want to be sure and get right to the heart of what you're concerned about and thinking about. And I know that the types of issues you're talking about are of great concern to this Commission and laudably so. A couple of responses, I think, first, it's not true to say, and I know Ms Kater's comments say this, that it's not free to play. And the evidence in the record is uncontroverted as Mr Vela explains. You do get free chips every single day that you log on and every 30 minutes, so it is possible to play for free. It's not the case that you have to buy tokens. So then your other question then, why would people do it? And I think the answer is, this is a common model for games and the reason people pay money to get additional tokens, or other in-game virtual items is the entertainment value.

1:50:22 Henn: And that's not to take away from your concern, which is not about somebody spending \$2, but somebody spending more, but that's the value they get in. You're absolutely right, that once they spend the money, that money is gone, it's not... That's why it falls outside of the longstanding understanding of gambling, which is when you put something at risk, you pay consideration, you play a game of chance and something is at risk that you could get back or you could lose. Here, once that... Once you buy those tokens, everyone knows that money is gone. You're not... So when you go on to use those tokens, you're seeking the entertainment value, not to get any money back and that's why this is really different under existing law. And whether some new kind of law might come into place if, addressing concerns like yours, is not really at issue in this petition, it may be for the legislature, it may be for other bodies to make those sorts of decisions. But what we're looking at, is just under existing law and again, as it's been interpreted and explained for since... Long... For many, many years, whether this model...

1:51:35 Troyer: Technology's changed. For many, many years, the law has been... A lot of this stuff, the technology and things that are out there didn't exist, and they weren't even part of what the law was written for.

1:51:47 Henn: I think...

1:51:48 Troyer: Do it on your phone, a lot of these laws....

1:51:50 Henn: That's undoubtedly true that a lot has changed about our world and it was interesting to hear the discussion of Bingo and pull-tabs this morning, 'cause lots of things are changing. And absolutely, laws, new laws get passed to address different things and may well... That could happen. But this game, the Big Fish Casino games were around, for example, when this brochure was published. And as I understand it, there was a discussion and a demonstration of how it worked and the guidance that was put out and has been in place since 2014 was that buying virtual prizes, if a player spends real money for a virtual prize and these items cannot be sold or redeemed for real value or a prize, it's not gambling. And that's kind of what everyone's understood. Now the law could change, but again, we're here just asking for this narrow petition to be decided, which is: Does this game fall outside of the definition of gambling? And I'd be happy to reserve my time or answer questions.

1:52:58 Trujillo: I just wanted to just quickly follow-up on what Ed was saying, is that... There is definitely... We're moving towards a confluence where, between video gaming, which I think is almost an archaic term now, and gambling, there are a lot of activities out there that do have, or that pose risks for a certain sector of our population that will suffer from gambling disorder on the gaming side and gaming disorder on the video side. And then there's some excellent work, like Cam Adair does great work with young people who are addicted to video gaming. And definitely that's something I think the legislature could take a look at, as things become more and more used on mobile, or consoles, or even PCs, just to see how we can help people who suffer from a disorder. So I just wanted to put that as something for us to think about. And it... No it's just more of a comment. Thank you.

1:54:03 S?: [1:54:03] [inaudible].

1:54:05 Henn: I'd like to reserve my time. I'm happy to answer any other questions, but I appreciate everyone's time, thank you.

1:54:12 Sizemore: Well, we're not keeping super close time but we will certainly extend similar time to Mr. Tievsky. We might be going [inaudible]. I don't know.

1:54:27 Henn: Thank you very much.

[laughter]

1:54:28 Sizemore: That's not true. You have the right to the same amount of time.

1:54:29 Tievsky: I appreciate that.

1:54:32 Sizemore: Going around about 10 minutes, just let you have an idea, don't worry about it.

1:54:39 Tievsky: Thank you, that's helpful. So I think that Commissioner Patterson, when we started out this discussion, I think you identified the exact flaw in Big Fish's argument here, which is that they're basing it... And the phrase "common understanding of gambling" was said over, and over, and over again. That just means what they think gambling is. We have... In Washington, there is a law that defines what thing of value is, and they cannot explain why this isn't. Why their chips aren't something that allows you to play a game or a scheme without charge. Their only response to that is, "Our game is free." It isn't free. It isn't free. And the way you know that is because they used to be owned by Churchill Downs, which is a public American company. Public companies have to put out investor reports, they're public. The federal government puts them out on the website. And here's what they say about how they're gonna make money. "Our business depends on developing and publishing free-to-play, and premium paid casual and mobile games that consumers will download and spend time and money on consistently." I don't understand how you can possibly spend money on a game that is always free. And the language changed there somewhat. At the beginning she said you can always play it for free. And then in response Commissioner Troyer's question, "It is possible to play it for free."

1:56:09 Tievsky: Here's how it actually works. They give you some free chips. They give you a bunch when you start, and they do, they give you a limited amount at certain intervals. You run through

those real fast. They get you through... Depending on what games you play, they get you through 15 minutes, it's not very long. And then it pops up with a screen and it says, "Continue the fun, \$9.99." And that gets you a little bit more. Now when they notice that you start spending a lot of money, like Miss Kelly, who submitted the letter, they start reaching out to you and they say, "Hey, you're in our VIP tiers. What can we do to help you out?" They start sending personal notes. They start telling you things like, "Well, we can give you some more free chips, but the amount of free chips we can give you depends on how much you've spent recently." "Recent spend" is what they call it. Until you get to the point where you're like Miss Kelly, you've spent more than the \$300,000 on the game and you start asking your personal VIP representative, "Hey, can I have some more chips." And they say things like, "Well, I'm not really allowed to give you any more free ones right now because we have to base how many free chips we can give you on certain factors like recent spend, but just this one time I'll give you a few."

1:57:26 Tievsky: And this is in response to Miss Kelly saying things like, "I just went through \$400 worth of chips in an hour." "\$1000 worth of chips in an hour." So to say that this game is free, is just a gross, gross, mis-statement. I don't think there's anything more real world than cashing out your husband's retirement account and running up huge Hela loans just to play this game. That's real world. So yes, they give away some free play. So does 7 Cedars, so does Ilani so does probably every casino in the state, to get you in the door. And look, when you're regulated, when the Commission approves these things, that's fine. But this is totally unregulated. They operate not under your oversight in any possible way. I'd like to discuss a little bit common understanding of gambling. So there's a case from a few years ago that the Commission was involved in called Bulls Eye. Bulls Eye involved a machine that you got to play for free every day. Everyone got a free play. But then if you wanted to play more after that, you had to put in money. And the Commission argued to the court, "Hey, it doesn't matter that you can play for free every day. It's still gambling." And the Court of Appeals agreed with the Commission.

1:58:43 Tievsky: And that's what the Ninth Circuit relied upon when it said, "You know, it doesn't matter that you can't cash out, it doesn't matter that they give you free chips sometimes, that's not relevant. The point is they have value because people have to buy them to keep playing the game, they extend the privilege of playing the game for free."

1:59:02 Patterson: But continuing to play for some is more valuable than actually winning money.

1:59:08 Tievsky: That's correct. And that's what Professor Schüll explains in her book and in the letter she kindly submitted, that, yes, for people who are... Particularly people who are addicted to machine gambling, that what they're looking for is to be in what's called... They call it the machine zone. It's sort of this dissociative state that people get addicted to, that they're just sucked into the game and that's what you see with problem slot machine gamblers and you see exactly the same thing here. And Professor Schüll explains that this is exactly, exactly the same thing. Let's see, with respect to... Oh, I'm sorry.

2:00:01 Patterson: So I guess... You were making the point that there is a difference between gambling addiction and gaming addiction. With a gaming addiction, there's never a point where the game will compensate for 99 cents.

2:00:24 Trujillo: Well [inaudible], I mean [inaudible] points it out, I mean there are plenty of console games and PC games, you know Overwatch, you can spend lots of money. But the question

is, is that gambling or is that not gambling? But the same addictive qualities are there. I mean I think Schüll's work is excellent there, but that also applies to definitely things that are not gambling, as well as things that are gambling.

2:00:54 Tievsky: Anything... Oh. I'll let Commissioner Troyer go ahead.

2:00:55 Troyer: Okay, real quick, just 'cause I want to ask you guys, you said something that, you can spend up to \$400 an hour, \$250 or \$400 an hour, is that actually possible? If you're the worst poker player or the worst [inaudible] player can you actually put \$400 into this and make it disappear in an hour?

2:01:14 Sizemore: Well she'll come back, if you wanna ask her that.

2:01:17 Troyer: Okay, alright. He said that, I just wanna make sure, you know that's a pretty big statement...

2:01:23 Sizemore: Right.

2:01:23 Troyer: I just wanna make sure that that's actually a real thing.

2:01:28 Tievsky: Yeah, it's a real thing. Maybe even more than that, there's no limits on how much folks can spend. It is an awful lot of money. As far as the video game question, I think part of the reason that this is gambling as opposed to some of the video games and other things you're talking about is that you have to... First of all it's completely a game of chance, which is part of the gambling rules here in the state. There's no... These are slot machines. There's nothing the players can do to affect the outcome, that's part of it. The other part of it is that you have to pay to continue, so it's not a matter of paying to enhance your gameplay, to get a better soccer player or to... To get something that looks cool. It's either you pay or you stop. And that's the really psychologically powerful part that Professor Schüll talks about in her research.

2:02:24 Sizemore: About two minutes.

2:02:29 Tievsky: Thank you, in my end of my time, I'd like to address the pamphlet that the commission put out a few years ago. So when I say the Commission put it out, it is a two-page, like tri-fold pamphlet that director Troyer and his staff put together several years ago. There's no indication, I asked for records about this. There's no indication that any commissioner ever saw it, that there was ever a vote on it. It's something that staff put together to have in the lobby, basically, based on their understanding, but the staff does great work here, every staff member I've interacted with has been outstanding, but it's the commission that sets the policy here and I don't think, I think it would be a mistake for the commission to feel hamstrung by something that that staff put together based on their understanding. And if you look at documents from around that time in 2013, this was brought... Big Fish in fact, in particular, was brought to the Commission and the chair of the commission at the time, Mr. Ellis questioned said, "Well, wait a minute, this kind of sounds like gambling to me."

2:03:30 Tievsky: So the idea that this has been some sort of... That, "we're just confirming what the Commission has always said," is not accurate. The Commission has never come to a consensus that "well obviously Big Fish Games isn't gambling." That is very, very much as commissioner Troyer

mentioned earlier, an open question. And let's see, I will end with this. If this game is free, I do not understand how the company is worth almost a billion dollars and how they've made one year, publicly reported profit on just the casino portion of the game \$180 million, I don't understand how you can do that with a game that as their counsel said, is always free. Those things don't add up. I'm happy to answer any other questions. Thank you.

[pause]

[background conversation]

2:04:45 Henn: You have all been very patient and generous with your time so I'll keep this brief, but I do appreciate just a few minutes to address, to respond a little bit. I think what you've just heard and what you see in the comments that have been submitted, several of them is an argument about expanding or changing existing law, and perhaps regulating things that are not currently regulated under Washington's Gambling Act. What you didn't hear was an argument about why the staffs' brochure that was in place starting in 2014 is wrong, based on the three traditional requirements for something to be gambling, the consideration, chance and prize. And that's really the key reason we think under existing law that it's pretty clear that our games don't fall within that statute and that is what this petition, the narrow question this petition is raising, is whether Big Fish Casino games are gambling under existing law, not what future law might look like or how, if one were going to regulate these games, how one might do it.

2:06:04 Henn: Just to respond to the points Mr. Tievsky made about how this game could possibly be free. The facts are very plain that free tokens are given every day, given every 30 minutes, that the vast majority, I think it's over 90%, and we could submit evidence on that if you prefer it in a sworn declaration, of people never pay money. So it's just not correct for Mr. Tievsky to claim otherwise. These games are free-to-play, and most people play them that way. Others choose to buy virtual coins for their entertainment value, to extend game time, to allow them to make bigger different kinds of bets in games. And again, the thing that's key about this is, once people purchase those tokens, their money is spent, then they go and play the game, and if they consume chips, they're doing that as part of the entertainment of the game. There's never any real world value to those coins.

2:07:14 Henn: Arguments about revenues that Big Fish Games takes in just aren't... I would submit that they're sort of to divert attention from the narrow legal issue here, because that's not at all relevant under the statute to whether this is gambling. We've talked through the elements, and I appreciated the focus on the statutory language, which is extending game time without charge. When this game is free-to-play, we submit that it just doesn't fall under the statute that it's been clear for many years and many have relied on that interpretation, and playing, and making these games.

2:07:53 Patterson: So, that profit that the company is making is substantial. And you just said that that profit is being provided by 10% of the people who play.

2:08:06 Henn: I don't have the exact percentage here, but it's definitely true. And as I said, we can submit evidence about it if the Commission wants more information that over 90% never spend money.

2:08:20 Patterson: Okay, so the 10% then are spending a heck of a lot of money. The 10% might have a

problem.

2:08:25 Sizemore: Is there ad revenue?

2:08:29 Patterson: Pardon me.

2:08:29 Sizemore: I'm just curious if there's ad revenue.

2:08:32 Patterson: I mean, where else do you get revenue from?

2:08:36 Henn: I don't wanna mis-state anything because I didn't study up on this and ask my client. So if the Commission would like to know that, I can definitely find out more, but again...

2:08:45 Patterson: I guess, my point, or my question is that if 10% of your players are generating an enormous amount of money, that sounded like an enormous amount of money to me, I would think that that 10% is spending an enormous amount of money. Maybe that 10% has a problem. Maybe they're getting something of value that would result in them providing enormous profits, enormous profits to that company. That's just what I'm thinking right now.

2:09:13 Henn: No, and I appreciate that. And I think Commissioner Troyer made comments that were similar about focus on that concern. I do think this is a quite common model of freemium games, where there are in-app purchases available and Electronic Software Association makes that argument as well in its submission. But again, getting to the statute and how gambling is defined under Washington State Law, I would submit that those issues, that I know the Commission is very concerned about, with responsible play, is really about if this were gambling or if the law changed so that it was regulated, how you might do that. Whereas under existing law, it's pretty clear that that third element of the prize is missing here, because nothing of real world value is at stake when people play these games. Nothing. The tokens can never be converted into cash or money or anything of real world value. And that's really what the brochure described and explained. And again, there are many, many games, that, kind of, do the same model, where it's free or you can choose to buy things. And the value you get from those purchases is the entertainment value, not a thing of value as defined under the law to require... As required under the law to make it gambling.

2:10:41 Sizemore: Alright, I think your time is just about expired, but Commissioner Troyer has a question.

2:10:48 Troyer: I just wanted to come back to the same thing I asked before, can you spend \$250-400 an hour playing?

2:10:52 Henn: I'm not aware that... I think that that may well be true. I don't think there's a limit that I'm aware of in terms of what you can play or what... How many tokens you can put...

2:11:06 Troyer: Is it possible that the machine and the program would let you spend that much money in an hour playing, yes or no?

2:11:12 Henn: I would want... Before I answer a factual question like that, I think I would wanna double check with my client, but again, I think... And I'd be happy to do that if the Commission would like, but I think the key part, again, is while there is consideration and while there's a game

of chance here, there's no money ever coming out, there's nothing of value, these things can't be converted to a thing of value, so... Prize or a thing of...

2:11:38 Troyer: I'd like to, actually, know that. And just putting it into perspective, if you had a elderly parent that was spending \$500 a day doing this, what would you do about it? Just think about that, we wanna know that question, we want protections for somebody, that gets... Like, casinos can tell people are gambling a lot of money, and they consult. They can ban people, they can recognize problem gambling. Do you have a mechanism in place when somebody spends \$500 a day playing free cards to stop that? I'd like to know that, if that's a possibility. And then also, it started to sound like your arguments boiling down to technicality that's in a piece of paperwork or an old law, or somewhere in a brochure, and not what's really happening. And so I guess we're gonna have to take a look at that.

2:12:27 Sizemore: Yeah. Okay.

2:12:29 Troyer: You know where I come from on the whole thing. It seems like every time we talk and the more I get to know about this, the worse it sounds. Just being honest with you.

2:12:38 Sizemore: Alright.

2:12:39 Henn: I think just in response, the entire industry relies on knowing what the law is, and being able to read the law and understand it. And this Commission plays an important role in interpreting the law.

2:12:50 Troyer: Right. But, you guys are the ones who came and brought this up to us.

2:12:53 Henn: Because of the uncertainty. That's correct. And we're just asking the Commission to interpret the law that's on the books.

2:13:02 Sizemore: Alright. So thank you. Senator Conway.

2:13:08 Conway: From the legislative side here, how many Washingtonians play Big Fish?

2:13:12 Sizemore: Hold on a second. Senator Conway.

2:13:16 Henn: That is in the Vella declaration, and I believe it's upwards of 700,000 who have downloaded the game that's with a geo-location in Washington State. Let me double check that, so I'm sure that I gave you the right number though. More than 865,000 installations of this game have come from an IP address geo-located in the state of Washington.

2:13:47 Conway: And am I right in assuming that 10% of those people are paying for chips?

2:13:53 Henn: I don't know that number. What I came here knowing was that over 90% play for free, but if you want the precise number...

2:14:01 Conway: Alright, I do. I am a legislator here. I think that we'd like some facts, okay. Thank you.

2:14:06 Henn: Yes, absolutely. We'd be happy to submit that.

2:14:11 Sizemore: Commissioner Patterson, you had another...

2:14:13 Patterson: I don't know. I'm just really struck by the fact that 10% of the players are making that much money for your company. What is it about the 10%? Why would they spend all that money? Why isn't the money coming equally from 100% of your players? That's all.

2:14:36 Sizemore: Okay. Alright.

2:14:38 Considine: And I think those are information that they are clearly willing to try and give you. And that might be best formulated when you go into closed session; if you want more information how to do that. I would just say, Mr. Chair to give anyone else that's here today a chance to comment, or see if anyone wants to comment before we break for a closed session, since we're running up to the noon hour.

2:15:01 Sizemore: Yep. So, thank you.

2:15:02 Henn: Thank you very much Mr. Chairman.

2:15:03 Sizemore: So I am offering the opportunity for any other interested party in this petition for declaratory order, in regards to the thing of value component of this matter. If there is anyone else that would like to come add something to the record. Does not appear that there is. So I would propose... Maybe we got two commissioners already decided to go to closed session early.

2:15:39 Considine: I would.

2:15:40 Sizemore: Not a quorum, mind you, just two. We have a space? Okay.

2:15:50 Considine: We do, I would just see, just so that we can close this down before you go, is there anybody from the public that wants to provide any more comments on Big Fish petition in general? That way, if there was anything else, now's the time.

2:16:04 Sizemore: Okay. I will extend that offer, if you didn't hear, if there's anyone from the audience that would like to add something to the record on this Big Fish petition. Doesn't appear that that we have anyone. So, we are going to go into closed session. Estimated 15 to 20 minutes. And then we'll return and let you know what we are gonna do next.

2:16:35 Sizemore: We're coming back again.

[pause]

2:17:03 Considine: Like thirty minutes ago. [laughter] It's okay.

[background conversation]

2:17:36 Sizemore: Alright. We are back in open session, and on the matter of Big Fish Games petition for declaratory order, we will be siding this matter over until our October commission meeting for further consideration and decision. The comments submitted so far require serious thought and

consideration and deal with complex issues of statutory interpretation. For these reasons good cause exists to extend the statutory limits set forth in RCW 340.05.240. So, the Commission has signed an order to that effect, and we will not be having any further oral arguments on the matter. Any additional information that people would like to include in the record would need to be submitted to Brian Considine by September 30th and then we will announce some sort of decision in October. So, it's the closing of additional information. Brian.

2:18:58 Considine: Would you like to give a time on that like 5:00 PM?

2:19:01 Sizemore: Sure, 5:00 PM Pacific time...

2:19:07 Considine: Thank you.

2:19:07 Sizemore: On September 13th, to be included in the record. So with that, it completes our work on the petition for declaratory order for this meeting. And so our next act is we will be going into executive session to discuss pending investigations, trial and negotiations and litigation. We anticipate that as lasting about an hour and we will reconvene at 1:45. So, we are at lunch.